IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 84.

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

PELHAM G. WODEHOUSE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

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Opinions Below.

The opinion of the Tax Court (R. 14-28) is reported at 8 T. C. 637, and the opinion of the Court of Appeals (R. 90-98) is reported at 166 F. 2d 986.

Jurisdiction.

The judgment of the Court of Appeals was entered on March 16, 1948 (R. 98-99). The petition for a writ of certiorari was filed June 9, 1948, and granted October 11, 1948. The jurisdiction of this Court rests upon 28 U. S. C. Sec. 1254.

Questions Presented.

Whether payments made by publishers in the taxable years 1938 and 1941 for the serial rights in the United States and Canada, and in one instance for the book rights, to literary works of taxpayer, a nonresident alien, constitute taxable gross income within the meaning of Section 211 (a) (1) of the Revenue Act of 1938 and of the Internal Revenue Code.

Statutes and Regulations Involved.

The preliminary statements in petitioner's brief seem to require no comment. We add, however, the following extracts from the 1936 Senate Finance Committee Report on Section 211 (a) (1); (S. Rep. No. 2156, 74th Cong., 2d Sess., pp. 21, 23, 1939-1 C. B. (Part 2) 678, 691-693) which is substantially the same as the House Ways and Means Committee report (H. Rep. No. 2475, 74th Cong., 2d Sess., pp. 9-10; 1939-1 C. B. (Part 2) 667, 673-674), because some of the language in these reports appears to be relied upon (quite mistakenly, we submit) by the Commissioner here, as well as by the Second Circuit Court of Appeals in *Rohmer* v. *Commissioner*, 153 F. 2d 61, cert. denied 328 U. S. 862, as the chief basis for taxing payments of the kind here in question:

> "Your committee concurs in the main in the substantial changes made by the House Bill in our present system of taxing nonresident aliens and foreign corporations. It seems obvious that a surtax on undistributed corporate profits is not well adapted to the taxation of a foreign corporation with foreign shareholders in respect of its

income from sources within the United States. In section 211 (a) it is proposed that the tax on a nonresident alien not engaged in a trade or business in the United States and not having an office or place of business therein, shall be at the rate of 10 percent on his income from interest, dividends, rents, wages, and salaries and other fixed and determinable income, with no allowance for the deductions from gross income and credits against net income allowed to individuals subject to normal tax and surtax on net income. * * * This flat tax (in the usual case) is collected at the source by withholding as providing for in section 143. Such a nonresident alien will not be subject to the tax on capital gains, including so-called gains from hedging transactions, as at present, it having been found administratively impossible effectually to collect this latter tax. It is believe this exemption from tax will result in considerable additional revenue from the transfer taxes and from the income tax in the case of persons carrying on the brokerage business. The principal increase in revenue will result, however, from withholding tax on dividends heretofore not required.

"In the case of a nonresident alien engaged in trade or business in the United States or having an office or place of business therein, the same tax is levied upon his net income from sources within the United States as is levied upon the American citizen or resident under the House bill.

* * * *

"In the case of a foreign corporation not engaged in trade or business within the United States and not having an office or place of busi-

> ness therein, the House bill would levy a flat rate of tax of 15 percent on the gross income of such corporation from interest, dividends, rents, salaries, wages, and other fixed and determinable income from sources within the United States (not including capital gains), the tax being collected in the usual case by withholding at the source, with no deductions or credits allowed. Your committee concurs in the substance of these provisions but recommends an amendment to section 231 of the House changing the rate of tax on such income. * * *.
>
> * * * * *
>
> "Your committee believes that the proposed revision of our system of taxing nonresident aliens and foreign corporations will be productive of substantial amounts of additional revenue, since it replaces a theoretical system impractical of administration in a great number of cases."

Summary of Argument.

Since 1936, taxpayers like Wodehouse, who is a non-resident alien not doing business in the United States, have been taxable only on income which prior to 1936 was subject to withholding of tax at the source (with the exception of dividends, which were expressly added to the taxable category by the 1936 Revenue Act). Only fixed or determinable annual or periodical income has ever been subject to withholding, and the proceeds of the sale of property have never been so subject.

The transfer of the copyright in Wodehouse's stories to Curtis, reserving all but the serial rights, for a fixed sum, entirely unrelated either to volume

of sales or period of time, was a sale of property within the meaning of the Revenue Acts, and hence on that ground alone not subject to tax here.

If the non-recurrent income received by the taxpayer is held to be royalty rather than purchase price, it is not fixed or determinable annual or periodical income. This seems evident from the plain language of the Revenue Acts and Treasury Regulations, and if these were in the least ambiguous, would find support in an unbroken line of legislative history and departmental interpretation from 1913 to date.

ARGUMENT.

The transfer of title to copyright for a single payment, neither related to any period of time nor contingent upon sales, is not "fixed or determinable annual or periodical gains, profits and income" under Sec. 211 (a) (1) (A) of the Internal Revenue Code, but is a sale of personal property and hence is not taxable to the taxpayer, a non-resident alien not engaged in business in the United States.

The petitioner (and, in two instances, his wife) sold all Canadian and United States publication rights in a number of as yet uncopyrighted stories for fixed sums to various American magazines in 1938 and 1941. Since by far the largest amount of money was paid by the Curtis Publishing Company (hereinafter called Curtis) for three serials, we shall deal specifically only with those sales.

Curtis paid for the stories by check (after receipt of the manuscript) to the order of the Reynolds' firm in New York City, which acted as agent, petitioner and his wife being in France in 1938, and in German hands

in 1941. The stories were only subject to common law copyright when sold.

Curtis enclosed with its check a printed memorandum of the terms of sale, which included its agreement to copyright the stories which appeared in its publications, and to reassign to the author all except the serial rights.

The 1938 and 1940 Revenue Acts both provide that in the case of non-resident aliens like petitioner, only "fixed or determinable annual or periodical" income shall be taxed, and further expressly exempt from tax the proceeds of the sale of property. On both grounds, the taxpayer claims that the proceeds which he received from Curtis are not subject to tax.

The well-reasoned opinion of the Court of Appeals (R. 90-98), 166 F. 2d 986, covers the ground thoroughly, and leaves us little to do beyond attempting to analyze the Commissioner's arguments herein, the reasoning of the *Rohmer* case on which he mainly, and Judge Dobie dissenting below exclusive relied, and the real legislative history involved.

Before 1936, non-resident aliens were taxed on all income from United States sources. The 1936 Act (followed in this respect by all later Acts) limited the liability of Wodehouse's class of alien to their income *subject to withholding at the source*, and carried into the *taxing* section—I. R. C. Sec. 211(a)(1)(A)—the precise wording of the *withholding* section—Sec. 143(b). The only change made in both sections from the *withholding* section of prior Acts was the addition of *dividends* to the classifications of income now subject to tax and withholding, making both sections apply to "interest * * * dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, *or other fixed or determinable*

annual or periodical gains, profits and income." (Italics in quotations are ours unless otherwise indicated.)

Ever since the above wording (except for *dividends*) was first adopted in the 1918 Act, the successive Treasury Regulations on withholding have uniformly begun, as they still do, with the words: "Only fixed or determinable annual or periodical income is subject to withholding." See for example Reg. 103 and Reg. 111, Sec. 19.143-2.

Proceeds of the *sale of property* were never subject to *withholding*, and accordingly a non-resident alien's taxable income since 1936 does not include "profits derived from the sale within the United States of personal property or real property located therein." Reg. 103, Sec. 19.215-1.

The Second Circuit Court of Appeals held on January 3, 1944 in *General Aniline & Film Corp.* v. *Commissioner*, 139 F. 2d 759, that down payments for patent rights, not contingent on future profits, were not taxable to this class of taxpayer, regardless whether title to the patent had passed to the assignee. The Court said:

> "We incline strongly to the belief that title to the patents passed to petitioner. *Littlefield* v. *Perry*, 21 Wall. 205. However the passing of title does not preclude the existence of royalties. But the crucial question here is whether the royalties are income to I. G. within the meaning of this tax statute. Under one of the contracts, a lump sum payment was made for the assignment. Such a payment is clearly not covered by the statute. The same would be true as to the other four contracts if the consideration had been payable in

installments, none of which was contingent upon future profits. Under each of those four contracts a down payment was made which cannot as a matter of law be recovered by petitioner even if the profits derived by it from the patents never equal the amount of the initial payment; as those payments are not contingent upon future profits they are outside the statute. We need not now decide whether the future payments under those four contracts, which depend wholly upon future profits, must be treated otherwise." S. S.

Shortly thereafter, the majority of the Second Circuit Court of Appeals in *Goldsmith* v. *Commissioner*, 145 F. 2d 466, cert. denied 323 U. S. 774, expressed the view that the grant of exclusive motion picture rights in a copyrighted play without limitation of time was a *sale*, but not of capital assets as defined in the 1938 Revenue Act, Sec. 117(a)(1). Of course, if the transfer of exclusive serial rights for a fixed sum, as here, is a *sale* (and it clearly is in the ordinary meaning of the word) that settles the matter, for the proceeds of sale are tax-exempt in every case—even if they are contingent on future profits. *Commissioner* v. *Celanese Corporation* (D. C. App.), 140 Fed. (2d) 339.

These decisions seemed to form a logical pattern of interpretation of the new method of taxing non-resident aliens inaugurated in 1936, despite some contrary decisions of the Tax Court and a New York Federal District Court to the effect that any grant of rights less than the whole copyright must generate *royalties*, which in turn must be taxable whether periodical or not. *Irving Berlin*, 42 B. T. A. 668;

Estate of Mafloa, 47 B. T. A. 184; *English v. Higgins*, 52 Fed. Supp. 805. These lower court decisions relied on *Sabatini v. Commissioner* (C. C. A. 2d), 98 Fed. (2d) 753, which held that *prior to 1936* a lump sum payment for motion picture rights under a statutory copyright *for a ten-year period* was a royalty, and hence *taxable; withholding* was not involved, and therefore the Court did not pass upon or even mention whether this "royalty" was periodical or not. On this point, *Sabatini v. Commissioner*, seemed overruled by *Goldsmith v. Commissioner*, *supra*.

The *Rohmer* decision in effect overruled *General Aniline & Film*; distinguished *Goldsmith* by giving the simple concept of "sale" an opposite meaning in two sections of the Internal Revenue Code; and set up a novel criterion of "sale" by non-resident aliens, depending not on transfer of title but on transfer of substantially all rights, what is "substantial" to be determined from case to case.

The sole ground on which the Court justified both this dual conception of a sale and its surprising about-face in holding that royalties which it conceded are not *annual* or *periodical* are still taxable, is the "legislative history" of Sec. 211(a)(1)(A), which it says "was not called to our attention before we decided the *General Aniline* case". This "legislative history", the opinion reveals, consists only of the reports of the Congressional Committees on the 1936 Act. (See the Senate Report, *supra*, which is substantially the same as the House Report.) If these reports in fact were susceptible of the Court's construction of them, it is strange that their import was overlooked in all the Treasury Regulations issued since 1936, and also in 1943 in the Government's presentation of the

General Aniline case, which involved a large amount of tax. The supposed "legislative history" seems to have been a ten years' after-thought on the part of the Government.

On the first point, all that can be said is that not a word anywhere in the legislative history relied on suggests that "sale" is used in a special or esoteric sense in the case of non-resident aliens. Neither Judge Chase, who wrote the *Sabatini* opinion and adhered to its reasoning in concurring in *Goldsmith*, nor Judge Learned Hand, in his majority *Goldsmith* opinion, intimated any reliance on any supposed different legislative history of Sections 117 and 119 I. R. C. but based their opposite conclusions on general law.

The *Rohmer* opinion explains its different interpretations of the word "sales" as to citizens and aliens, by the supposed different histories of the respective sections. However, the Court will note that the Senate Committee Report on the 1936 Act with respect to the tax on non-resident aliens on which the *Rohmer* opinion relies refers twice to "capital gains". We respectfully submit that the proper conclusion to draw from such references is that the 1936 Committees had in mind the capital gains section when they were revising the taxation of non-resident aliens. And in that event, we suggest that it was unlikely that they intended such a simple conception as the sale of property, which was fundamental to both the capital gains and non-resident alien sections, to be interpreted in contrary ways.

Moreover, the capital gains section (sec. 117 I. R. C.) and the section itemizing the income from United States sources taxable to non-resident aliens (which

is now sec. 119 I. R. C.) including gains from the sale of property in the United States, and rentals and royalties from such property, both appeared for the first time in the 1921 Revenue Act. The withholding section (Sec. 143(b) I. R. C.) has a much older and quite different history, and never included gains from sales. And it was the withholding section (with its legislative history) which was incorporated bodily in 1936 in what is now sec. 211(a) (1).

Legislative History.

In the very first income tax act—that of 1913—the provisions for withholding and payment of tax at the source (which then applied to citizens and aliens alike) contained almost identically the same wording to describe the particular kinds of income subject thereto, as has been used in every Revenue Act up to the present date.

Section III of the Income Tax Act of 1913, c. 16, 38 Stat. 114, 166, which provides for withholding, uses only the generic words "fixed or determinable annual or periodical" income (at p. 169). However, Section IIE of that Act (38 Stat., p. 170), which provides for payment to the Treasury Department of the amounts withheld, uses the following detailed language:

> "All persons * * * having the control * * * or payment of interest, rent, salaries, wages, premiums, annuities, compensation, remuneration, emoluments or other fixed or determinable annual gains, profits, and income * * *"

The Court will note that every item listed above has been repeated *verbatim* in every Revenue Act since

1913. And the only additions to the items have been the insertion immediately following "interest" of a parenthetical exception of certain interest on bank deposits (beginning with the 1921 Act), and the addition of "dividends", beginning with the 1936 Act, which also added the concluding blanket clarifying clause after "income": "(but only to the extent that any of the above items constitutes gross income from sources within the United States)."

The longer wording of the 1913 "payment" provision above omitted the words "or periodical" immediately following "annual". If this had any significance beyond a slight lack of meticulousness in draftsmanship, it must have been that Congress was using the words "or periodical" in a sense so close to "annual" that the difference was not very significant, and was presumably limited merely to other subdivisions of the calendar, such as weekly or monthly payments.

The next Revenue Act, that of 1916, c. 463, 39 Stat. 756, Sections 8 (d) at page 762 and 9 (b) at page 763, conformed the language of the "withholding" and "payment" sections by adding the words "or periodical" to the latter.

Section 1211 of the Revenue Act of 1917 for the first time provided for information at the source in lieu of withholding at the source as to *citizens*, on the same enumerated items, but not limited to "annual or periodical" income. The deletion of the last three quoted words has made all "*fixed or determinable income*" (italics supplied) subject to information returns since then; while Section 1205 of the 1917 Act retained the *additional requirement* that the income must be "annual or periodical" to be subject to *withholding*, which was thereafter required only in the case of non-resident aliens.

This important distinction in the most vital words of the *information* and *withholding* sections of the Revenue Acts, has been continued in every Revenue Act from 1917 to date, and the Treasury regulations issued under each act during that entire period have continued to call attention thereto.

When Congress in the 1936 Act adopted for the *taxing* of this class of non-resident aliens the precise language used in the *withholding* section for nineteen years before, *ipsissimis verbis*, with the addition of the single word "dividends", it seems too plain for argument that (with that single change) Congress intended in future to tax such persons *only* on income previously subject to *withholding*. And both Senate and House Committee Reports state that this tax "*is collected at the source by withholding as provided for in section 143*". [S. Rep. No. 2156, 74th Cong., 2d Sess., pp. 21, 23 (1939-1 Cum. Bull. (Part 2) 678, 691-693); H. Rep. No. 2475, 74th Cong., 2d Sess., p. 9 (1939-1 Cum. Bull., (Part 2), 667).]

The Senate Finance Committee's Report briefly describes the taxable income as "income from interest, dividends, rents, wages and salaries and other fixed and determinable income", while the full wording of the statute is:

> "interest (*except interest on deposits with persons carrying on the banking business*), dividends, rents, salaries, wages, *premiums, annuities, compensations, remunerations, emoluments*, or other fixed *or* determinable *annual or periodical gains, profits, and* income."

It is the casual compression of the statutory words "fixed or determinable annual or periodical gains,

profits and income" into "fixed and determinable income" upon which *Rohmer* seemingly relied, as does the Commissioner here, to delete from the statute the words "*annual or periodical*", which had been the heart of the withholding section for nineteen years, *and still are*.

It would seem no more absurd for a taxpayer to claim that "premiums, annuities, compensations, remunerations, emoluments" [words used in the statute—Secs. 143(b) and 211 (a)(1)(A)] were no longer intended to be taxed, because omitted in the Committee's cursory summary, than for the Government to contend that the Committee meant thus casually to cut out the core of the section—the *annual or periodical nature* of all the different types of income specified.

To interpret the words "*fixed and determinable*" as having some independent meaning except as a mere abbreviation of the full statutory language reduces them to a tautology of little meaning. Every kind of taxable income which is "fixed", is already "determined".

The words "other fixed *or* determinable gains, profits and income" have been used in the "information at source" section of the Revenue Acts (now I. R. C., Sec. 147) since 1918. Their difference in meaning from the more restricted coverage of the withholding section (143) has been well recognized ever since. Treasury Regulations 103 (1940 Act), Sec. 19.147-1, says:

> "Although to make necessary a return of information the income *must be fixed or determinable, it need not be annual or periodical.*"

The Regulations from 1918 to date contain identical language.

But even if the House and Senate Committees had used the words "fixed *or* determinable income", we do not believe anyone would have thought (prior to the *Bohmer* case) that they thereby effected the substitution of the "information at source" provisions with their entirely separate elaborate machinery for the "withholding at source" ones, while at the same time incorporating the latter and not the former in the Revenue Act itself! And since 1917, both before and after the 1936 Act was passed, countless thousands of information and withholding returns have been filed on the two different sets of printed forms furnished by the Treasury Department in accordance with the different requirements of the two sections.

The Senate Finance Committee's Report does not pretend or need to have statutory precision. Its use of the phrase "*fixed and determinable*", which is a tautology *per se*, is understandable as a short-cut reference to the well known language of the withholding provisions; it would seem unthinkable as evidencing an intention to modify in any respect, much less to change the whole letter and spirit of the withholding provisions, *then already of 18 years' standing*.

What the Senate Committee's Report shows beyond peradventure is the intent of Congress to eliminate all tax liability of this class of aliens except income *subject to the existing withholding provisions*. This was because "*in many cases*" (not in all cases) the tax was hard to collect otherwise. Congress did not attempt further to redefine or reclassify any type of income on account of relative difficulty of collection;

obviously the tax on profits on *land* sold in the United States, for example, could readily be collected, but Congress preferred to overlook such refinements, and proceeded on the theory that no attempt would be made in future to collect any tax from such aliens *directly*, but only *through withholding agents*, in accordance with existing law.

One *specific* change of substance was made in 1936 in the previous withholding provisions, and duly noted in the Senate Finance Committee's Report. This was the addition of *dividends* to the taxable category.

The specific inclusion naturally negatives any *implied* additional inclusion of non-periodic royalties.

The *Rohmer* opinion quotes the Committees' statement of their belief that the revision "will be productive of substantial amounts of additional revenue". This is fully explained, we respectfully submit, by the further explanatory statement in the Senate Report that larger stock transactions would produce more taxes, and that "*the principal increase in revenue will result, however, from withholding tax on dividends heretofore not required*". Further, it was self-evident that the increase in the flat rate of tax on both individuals and corporations of this class, the disallowance of all deductions, and the total abolition of the personal exemption theretofore enjoyed by all such individuals, would add substantially to the revenue. There is not a word anywhere in the Reports, or in any other legislative record so far as we have found, to suggest that the Committees or Congress expected to get more revenues by subjecting to withholding forms of income not theretofore so subject, *with the single and express exception of dividends.*

Further proof that the Congressional Committees had no intention of singling out non-periodic payments

to authors for special taxation may be found in the status of the *Sabatini* case in 1936. In December, 1933, I. T. 2735, C. B. XII-2, 131, had held that "sales" of U. S. serial and motion picture rights were really *"licenses"*, and hence that payments therefor were taxable as royalties. This ruling dealt solely with *Sec. 119* of the Revenue Act—*Income from Sources within the United States*—and never even mentioned periodicity or "withholding", nor did its reasoning touch upon either in any way. But this ruling was disapproved in *Sabatini*, 32 B. T. A. 705, in 1935, which was not reversed on this point in *Sabatini* v. *Commissioner*, *supra*, until 1938. If Congress or its Committees gave the question any consideration in 1936, they would have found that under the decision of the highest authority connected with the Treasury Department such transactions were *sales*, and hence that their proceeds would apparently be tax free under the 1936 Act on any theory.

Incidentally, if despite *Goldsmith* v. *Commissioner*, *supra*, the highly technical reasoning of *Sabatini* v. *Commissioner*, *supra*, is followed to its logical conclusion, it seems clear that in this case, Curtis irrevocably acquired the *statutory copyright* in the stories and agreed only to *license* their later use. This is precisely the reverse of the *Sabatini* situation, where the taxpayer retained the ownership of the copyright, and merely sold a license. If there were any ambiguity in the Curtis contracts, it would seem to be resolved in the sense indicated by the decision interpreting an identical Curtis contract in *Eliot* v. *Geare-Marston, Inc.*, 30 Fed. Supp. 301, where the Court said (p. 306):

"The point that must be kept in mind is that

> Mrs. Eliot is not and never was the copyright proprietor of the literary production involved herein. By virtue of the assignment to her by The Curtis Publishing Company of all rights except the American serial rights, she became a licensee of all rights except those reserved."

If petitioner and his wife sold the copyright to Curtis (which acquired an irrevocable title thereto) and thereafter were mere licensees as to the rights reserved, it seems clear that under the *Sabatini* reasoning the sum received for the assignment of the copyright would be considered the *sales price*, while any amounts realized from the subsequent disposition of the reserved *licenses* would be *royalties*. Furthermore, since the *Sabatini* opinion was influenced by the assumed indivisible nature of United States statutory copyright, it may be doubted whether its reasoning could in any case be applied to Mr. and Mrs. Wodehouse, who had only common law rights when they contracted with Curtis, and at no time, so far as appears, owned the statutory copyright.

The Second Circuit cases attach paramount importance to *copyright ownership*.

The *Sabatini* opinion says "*there was no transfer of title*". Judge Chase in his *Goldsmith* opinion cites only cases involving the sole right of the *copyright holder* to sue, and says: "Unless the assignment conveys to the assignee the title to the copyright, no sale of property is made. In this instance there was no sale of the copyright since title remained in the assignor and therefore no asset, capital or otherwise, was sold."

In *General Aniline*, the opinion shows that besides having granted licenses to others, the patent owner

reserved for itself certain rights (apparently "substantial") to import the patent articles into the United States. In a footnote, the Court says that it regards as of no significance, as to the transfer of title, whether the assignor reserves a license, or the assignee grants one back to him; and evidently this means that in either case, *copyright title passes*. In commenting on this opinion in the *Rohmer* case, Judge Frank explains away only the rights previously assigned to others, and not those reserved to the patentee, so that the Court was evidently satisfied with that part of the *General Aniline* footnote which refers to licenses retained by the assignor, regardless of the supposed "legislative history". This seems the only explanation of his statement that if the taxpayer in *General Aniline* had previously granted away substantial rights, he could not thereafter, if an alien, make a *sale* of rights to any one, though he might under *Goldsmith*, if a citizen. Judge Frank could not have meant that an alien taxpayer, no matter how many rights he had granted, could not finally *sell* his *copyright*. But under the peculiar *Rohmer* doctrine that short of a transfer of *copyright*, an *alien* can only effect a sale if he grants simultaneously substantially all his rights, it would be logical that if he has previously *granted* a substantial part, he can no longer make a *sale* without transferring the indivisible copyright itself.

This is in accord with *Witwer* v. *Harold Lloyd Corp.* 46 Fed. 2d 792, 795 (reversed on other grounds (C. C. A. 9) 65 Fed. 2d 1) where the Court held that the doctrine of indivisibility "does not prevent assignment with a reservation of particular rights;" and with *Eliot* v. *Geare-Marston, Inc.*, *supra*.

When we note that here Curtis acquired not only the copyright, but also rights apparently worth eight times as much in money as what Wodehouse reserved, it would seem as a practical matter rather like the tail wagging the dog to treat Curtis as a mere licensee.

The emphasis on mere *title* (or lack of it) by the Second Circuit seems overtechnical in the practical interpretation of the tax law; "the entire theory that copyright is indivisible and does not admit of partial assignment is fictitious * * *." Shafter, Musical Copyright (2d Ed.) P. 139.

If in principle there should be no practical distinction for tax purposes between the sale of a copyright (reserving certain license rights) and the sale of certain license rights (reserving the copyright), we submit that in both cases unconditional lump-sum payments not having any determinable relation to any subsequent payments are free of tax, under the express language of the statute.

Departmental Practice.

Departmental practice was, if possible, even more emphatic than the Revenue Acts in upholding the requirement of recurrence.

The *Rohmer* opinion noted, as does the Commissioner's brief at p. 16 that "the Treasury Regulations, under the successive Acts from 1918 to 1934 inclusive, provided that the withholding provisions excluded income derived from the sale of property but included 'royalties'." But there is no intimation in any of these Treasury Regulations that *all* royalties are subject to withholding, unless "royalty" is restricted to the usual acceptation of the word. The

language of Reg. 86 (1934 Act), Reg. 94 (1936 Act), Reg. 101 (1938 Act), and Reg. 103 (1940 Act) as to withholding are exactly alike as to *royalties*. Art. 143-2 in each begins with the axiom: "*Only fixed determinable annual or periodical income is subject to withholding.*" Then after listing the statutory provisions it concludes: "But other types of income are included, as, for instance, royalties." Art. 211-7(a) of Regs. 94, 101 and 103 paraphrases the same thought as follows: "* * * *but other fixed or determinable annual or periodical gains, profits and income are also subject to the tax, as, for instance, royalties.*"

As the Tax Court recently pointed out in *Wolfe*, 8 T. C. 689, 696:

> "Nor does the fact that Regulations 11, sec. 29.22 (b)(2)-2, states that amounts received as an annuity 'include' amounts received in periodic installments, demonstrate that we have an annuity here. The Regulation does not say that every periodic payment is annuity."

That Treasury Regulations 94, 101 and 103 use the same wording in describing the taxable income of nonresident aliens as they and previous Regulations had used for nearly twenty years as to withholding, seems another conclusive proof that no change was contemplated by Congress in 1936 in the requirement that only periodical income was subject to withholding.

Further proof that not all royalties were subject to withholding is found in the amendment to Reg. 86, Art. 143-2, made March 16, 1935 by Treasury Decision 4535. This added "dividends" to the concluding sentence quoted above, making it read: "But other

types of income are included, as, for instance, royalties *and dividends.*" The significance of this is that prior to the 1936 Act the majority of dividends were not subject to withholding, but *some* were, and accordingly the Treasury Regulations grouped them in the same category with royalties. It would seem that royalties based on percentages of sales are as obvious an example of periodical income as a once-for-all-time payment for a perpetual license is of non-periodical income. The *Rohmer* opinion relies on the analogy of "interest paid for several years in one sum or rent paid in advance for the use of a building for a period of years." But is not the analogy here rather to the payment of a fixed sum for a perpetual easement? Such a transaction was held to be in effect a *purchase* in *Inaja Land Co.*, 9 T. C. 727.

The Treasury rulings of lesser authority than the Regulations tell the same confirmatory story of the primary importance of periodicity, only in more detail:

> Bulletin "B" on "Withholding" (60 pages long), first published by the Internal Revenue Bureau in 1920, under the 1918 Act, revised July 1, 1927, under the 1926 Act (stressing payments "from time to time"; *e. g.*, at p. 11: "earnings of lawyers and doctors are not usually within the purview of this provision of the law (unless paid as a regular retainer.")";
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> S. M. 975 (1919) C. B. 1, p. [illegible] (winnings on races not subject to withholding);
>
> I. O. 1024 (1920) C. B. 2, p. 189 (discount, though much like interest, is not subject to withholding);

O. D. 907 (1921) C. B., p. 232 (commission on single transaction not "fixed or determinable annual or periodical income");

Internal Revenue News, May, 1931 (p. 3) (periodical royalties subject to withholding; not so sale for a lump sum);

I. T. 2624, XI-1, C. B. 122 (1932) (book royalties subject to withholding);

G. C. M. 21,575, C. B. 1939-2, p. 172 (art prizes not "fixed or determinable annual or periodical income"; citing S. M. 985 and O. D. 908, *supra*);

I. T. 3781, Bull. Ref. 1946-3-12,228 (p. 14) re-organization distributions taxable as dividends under Sec. 112 (c) (2), I. R. C., are not periodical income subject to withholding).

We have tried to show that there is no foundation for the claim of *Rohmer* that there was any different legislative history of secs. 117 and 119 (a) (4) I. R. C. to justify treating the same transaction as a sale of property under sec. 117, and a "royalty" under I. R. C. Sec. 119 (a) (4). In reality, the Congressional Committees had both these sections in mind in their consideration of the 1936 changes in the system of taxing non-resident aliens, as well as the withholding section (now 143 (b)).

And the Senate Committee fully realized the well-established differences between the limited coverage of the withholding provisions of Section 143 (b) (to which was confined the liability of this taxpayer's class of aliens) and the broader range of Section 119, that Section being entitled "Income from sources within the United States." For immediately

following the description of the kinds of income taxable to our class of alien, the Committee said:

> "In the case of a non-resident alien engaged in trade or business in the United States or having an office or place of business therein, the same tax is levied upon his net income from sources within the United States as is levied upon the American citizen or resident under the House bill."

The Committee thus clearly distinguished between Section 143 (b) income, taxable under 211 (a) (1), and Section 119 income taxable under Section 211 (b). And the entirely separate legislative histories of Section 143 (b) and Section 119 thus continued along separate paths. Of course, Section 119 has always had this connection with Section 143 (b), that only fixed or determinable annual or periodical income from sources within the United States was ever subject to withholding. But it was not until 1936 that this limitation was explicitly stated in the withholding section.

The holding of *Rohmer* on the "sale" point, insubstantial as it seems in applying a most technical and unusual meaning to this word in one section, while apparently satisfied with the ordinary meaning in another, at least does not require the erasure of any words from the statute, as is further necessary to tax these non-periodic payments. "Excision is a 'desperate remedy,' * * * only a last resort, to be availed of when all efforts to reconcile the inconsistency by construction have failed," as Judge Cardozo said in *Matter of Buechner*, 226 N. Y. 440, 443, in interpreting a will. "It is one of the accepted canons of construction that statutes must be read so that each word will

have a meaning, and not so read that one word will cancel out and render meaningless another; that each word used in an enumeration in a statute of several classes or things must be presumed to have been used to express a distinct and different idea; that every provision of a statute was intended to serve some useful purpose." *Matter of Tonis* v. *Board of Regents*, 295 N. Y. 286, 293.

It seems particularly unnecessary to impute to Congress such a gross oversight in this case, as *Rohmer* seems to do, when not only was the very sentence (Section 1943(b)) of the withholding section of the 1936 Act (identical in this respect with the Internal Revenue Code section quoted hereinabove) in which the supposed oversight occurred, amended in that year by the express addition of *dividends* two lines above the first use of the "periodical" phrase (the only vital change from 1913 to date), but the very same sentence was further amended in a clarifying parenthesis of meticulous caution following the words "periodical gains, profits and income," by adding: ("*but only to the extent that any of the above items constitutes gros sincome from sources within the United States*) (italics supplied)." But perhaps even more decisive of the legislative purpose is the second use of the phrase in the concluding part of the same sentence. It would be strange indeed if a phrase meant to be omitted were overlooked not once but twice. But it is much more striking that in the second instance, the words "annual or periodical", rejected in *Rohmer* as meaningless, are the only words used by Congress to describe the income covered, showing that apparently this phrase is in truth the ultimate touchstone of the whole withholding section.

The implications of the *Rohmer* decision are not

limited to "royalties," but extend to all "fixed or determinable income" (except "capital gains"), which apparently will be held subject to withholding since 1936, whether periodical or not. And we gather from the Commissioner's brief at p. 40 that he considers all such payments taxable.

If in fact Congress and its Committees had by oversight allowed such an obvious error to slip by as the failure to strike out the offending "periodical" phrase, one might suppose that the Treasury Department would at once have taken steps to correct the mistake, so far as it could be regulation, or at least to warn the public, and that Congress would have corrected the error at its next session. On the contrary, both Congress and the Treasury have in repeated subsequent statutes and regulations continued to give the same prominence to that phrase.

Even as late as the argument in *General Aniline* in 1944—a case which involved over $100,000 in tax—the Commissioner was it seems unaware of the legislative history created in 1936. It was only in presenting the *Rohmer* case in 1945 that he made known his discovery.

The Statutory Meaning of "Royalties"

The Commissioner's brief (pp. 18-20) in its citation on the definition and nature of royalies requires several corrections.

The statement (p. 19) that "Congress has defined 'Rentals and Royalties' in Section 119 (a) (4) of the Revenue Act of 1938" is entirely erroneous. Not only this subsection, but all the Revenue Acts since 1913, will be searched in vain for any definition of "royalties." However, since 1918, there has been a defini-

tion of the term in Treasury Regulations, which after repeated re-enactments for thirty years must by now have the force of law. This definition is found in Art. 143-2 of Reg. 101, quoted at pp. 65-66 of the Commissioner's brief, and (with insignificant changes) in corresponding sections of all the Regulations since 1918. In effect, they are defined as "fixed or determinable annual or periodical income," for purposes of the withholding section, which has since 1936 been adopted as the full measure of taxability under Section 211(a)(1). And they have been similarly defined in Art. 211-7(a) of Reg. 94 and subsequent Regulations. This is the only definition which seems to affect the present case, which arises under that Section and not under Section 119. And for our purposes, it seems unnecessary to determine whether this definition includes all, or only some royalties, since in either case the non-periodical payments in this case are non-taxable. The only difference would arise in the case of taxpayers subject to Section 119 (a) (4), who might be taxable if the above official definition of the Regulations is only a partial one.

At any rate, the definition in the Treasury Regulations would seem to fit very well the common meaning of the word, as treated in the Commissioner's citations at pp. 18-19:

> *Commissioner* v. *Affiliated Industries* (C. C. A. 10) 123 Fed. (2d) 665, cert. denied 315 U. S. 812, where the only dispute between the majority and dissenting judge was whether certain determinable periodical payments were rents or royalties.
>
> *Hazeltine Corp.* v. *Zenith Radio Corp.* (C. C. A. 7) 100 Fed. (2d) 10, 17, where under the

contract there involved, a yearly payment for the use of patents was held to be "a period rate of royalty as distinguished from the percentage of selling price rate of royalty." This case, curiously enough, was referred to in foot-note 7 of *Rohmer* in support of the statement that a payment was no less a royalty when made in a single amount.

Kattenback v. *U. S.*, 66 Ct. Claims, 570 (the reference to p. 581 in respondent's brief is to another case between the same parties), where the payments were for a combination of personal services and the use of a secret process at an agreed annual compensation for three years, and hence were taxed as ordinary income rather than capital gain.

Tesra Co. v. *Holland Furnace Co.* (C. C. A. 6) 73 Fed. (2d) 553-554, where the Court defined a royalty as "a payment proportionate to the use of a patented device."

In *Western Union Tel. Co.* v. *American Bell Tel. Co.* (C. C. A. 1), 125 Fed. 342, defendant-respondent, after contracting to pay to the plaintiff one-fifth of all "rentals of royalties" which it received, proceeded to sell perpetual licenses to all the patents covered by the contract for a block of stock, and declined to pay over the agreed one-fifth of the stock to the plaintiff. On considering all the facts, the Court construed this as a breach of faith, and reversed the lower court's decision for the defendant. It discussed the general meaning of the terms as follows at pages 348, 349:

"Royalties are commonly understood as meaning something proportionate to the use of a pat-

ented device; in other words, a kind of excise. Bouvier's Law Dictionary, 'Royalty.' In its more ordinary meaning, it would not literally include the shares of stock for which an accounting is demanded. In some of its uses it is a broader word than 'rentals' and yet in other aspects is a broader word than royalties. Rentals in their ordinary signfication are not limited as royalties in their ordinary signification; that is, to something proportionate to the use of the patented device. The word 'ordinarily' means specific sums paid annually, or at other stated periods, for the right to use a patented device, whether it is used much or little or not at all."

The last sentence refers not to royalties, as stated at page 18 of the Commissioner's brief, but to rentals.

The dictionary definitions at page 18 also seem singularly unhelpful to his contention. 3 Bouvier's Law Dictionary (Rawles 3rd Revision) 2975 gives as the sole definition:

> "*Royalty*: A payment reserved by the Grantor of a patent, mining lease, etc., and payable proportionately to the use made of such right. 1 Ex. Div. 310. See Patent."

The pertinent part of the definition of "royalty" in Webster's New International Dictionary is:

> "a. A share of the product * * * reserved by the owner for permitting another to use the property.
>
> b. A duty or compensation paid to the owner of a patent or a copyright for the use of it or the

right to act under it, usually at a certain rate for each article manufactured, used, sold or the like." * * *

The *Sabatini* opinion itself recognizes that its definition of the single payment made in that case was without precedent. Since this decision was not handed down until 1938, it seems likely that when Congress passed the 1936 Act, it had in mind the usual ordinary meaning of the term.

This Court in *Crane* v. *Commissioner*, 331 U. S. 1, 6, recently held that the word "property", where not specially defined in the taxing statute, must be interpreted according to its ordinary legal acceptation. Even more recently, *Jones* v. *Liberty Glass Co.*, 332 U. S. 524, held that the term "overpayment" must likewise be interpreted in its usual sense, and could not at this late date be made over into a "word of art." The Court relied on "the sense in which the word was first used in this context," and on the fact that "the generic character of the word was emphasized from the start." The words "sale", "royalties", and "fixed or determinable annual or periodical" (income) seem to fall within the scope of these decisions.

The Petitioner's Brief.

The Commissioner's statement at page 17 that "until the rendition of the decision below it had appeared settled that nonresident aliens were taxable" on non-periodical payments must be challenged as to accuracy. The only authority cited for this statement is the note of Mr. Miller, then a third-year student at the Yale Law School, 54 Yale L. J. 879, a careful

reading of which hardly sustains the Commissioner's conclusion (the decision below received favorable comment in 48 Columbia Law Rev. 967 and 34 Virginia Law Rev. 617). On the contrary, after the *Goldsmith* and *General Aniline & Film Corp.* decisions of the Second Circuit, the law seemed well settled in accordance with the plain meaning of the statutes and regulations: that only income previously subject to withholding was taxable to aliens like Wodehouse and that this could not include a non-periodical "royalty," even if such a thing existed for any tax purpose. And while the footnote on page 32 states that *General Aniline* "was explained and distinguished" in *Rohmer*, the former case was in fact substantially overruled on the basis of newly-discovered evidence of legislative history, which we respectfully submit was wholly illusory. The *Rohmer* opinion conceded: "that the Congressional purpose is not crystal clear, and that the legislative history does not put beyond all conceivable doubt the purpose to impose a tax on such transactions as that before us here."

The Commissioner here for the first time raises the issue of tax payments by Wodehouse and his agents and one or two other cautious taxpayers as if to estop them by a new principle of taxpayers' practical interpretation of the statute, but he cites no authority for this, and it would seem a dangerous principle for the Treasury in the long run. That many foreign authors found themselves unexpectedly delinquent seems clear from the Tax Treaty between the United States of America and the United Kingdom, signed on April 16, 1945 and finally effective on July 25, 1946, which in Article XVII (1) contains the extraordinary provisions that the United States

income tax liability for any taxable year beginning prior to 1936, and still unpaid, might be adjusted with the Commissioner, on a basis not less favorable than if the United States Revenue Act of 1936 had been effective for such prior years; and that if the taxpayer was not engaged in business in the United States the total interest and penalties imposed should not exceed 50% of the total tax. It is of interest to note that the Senate Committee report on this treaty (Executive Report No. 4, 79th Cong. 2nd Sess. May 10, 1946) has attached thereto a report of the Bureau of Internal Revenue on alien taxation, which states:

> "The nonresident alien not engaged in trade or business in the United States is taxed on all his *fixed or determinable annual or periodical income* from sources within the United States, such as dividends, interest, rents, and royalties, but is exempt from tax on any gains from his transactions in stocks, securities, or commodities through a United States resident broker, commission agent, or custodian. The exemption thus granted to aliens in this category and on this class of transactions takes account, *inter alia*, of the rate of tax (imposed on a gross basis) on such *periodical items of income* and such administrative questions as the impracticability of determining and enforcing a tax against such aliens incident to their transactions clearing through our domestic exchanges."

The Commissioner admits at page 24 that "in a broad sense" or (at p. 27) "in a loose sense," Wodehouse might be said to have sold his stories to Curtis. We presume the Court may not only take judicial

notice that such would be the ordinary conception of the transaction, but also that any one in the literary or commercial world or in every-day life who described these sales as on a royalty basis would be thought guilty of a serious misuse of language.

The technicalities of copyright law, discussed at pages 21-27, seem adequately covered in the opinion below, which describes their amelioration since this Court's decision in *Independent Wireless Co.* v. *Radio Corp. of America*, 269 U. S. 459.

At pages 29-36, the Commissioner's argument seems to be that because Section 119 differentiates to some extent between royalties and sales, there must be also different treatment of them under Sections 143(b) and 211(a)(1), and because all sales are exempt under the latter Sections (only part being exempt under Section 119), all royalties must be taxed under Sections 143(b) and 211(a)(1), as they are under Section 119.

The first answer to this argument might be that if the established definition of royalties by the Treasury Department as fixed or determinable annual or periodical income is all-inclusive, then (in accord with *Goldsmith* and *contra* to *Sabatini*) the Curtis payments here would be treated under all Sections as sales and not royalties.

On the other hand, if the Treasury definition of royalties is only partial, and recognizes the existence of non-periodic royalties as well, then the Curtis payments might be taxable under Section 119, but not under Sections 143(b) and 211(a)(1). There is nothing in the least unusual in the last situation, for it has been well understood for thirty years that many payments (besides sales) which are taxable under Section 119 are not subject to withholding taxes.

Beginning with page 36, the Commissioner tries to show that the payments here in question are "fixed or determinable annual or periodical income", or rather he argues that while they evidently cannot be included within that definition, they should be taxed anyway, under the doctrine of *ejusdem generis*, because they are of the general type of the categories of income specifically listed.

This seems an unusual inversion of *ejusdem generis*, which is a rule of construction usually employed to limit the scope of general words found at the end of a list of particulars, while here the Commissioner seems to advocate just the reverse,—that is, to extend (or distort) the meaning of particular words found at the end of the statutory categories on account of three general words found in the preceding list,—"compensation, remunerations and emoluments."

On the contrary, it seems that these general terms must be understood to be limited both by the obviously "fixed or determinable annual or periodical" character of the other types of income with which they are associated (all of which, as the Commissioner admits at page 46, are "periodical in relation to time"), as well as by the use of this limiting phrase at the end of the list, whose importance has likewise been emphasized for the last thirty years by the applicable Treasury Regulations, which begin with the uncompromising statement that "Only fixed or determinable annual or periodical income is subject to withholding." In stating at page 41 that "That quoted phrase is in the language of the statute and not an interpretation of it", the Commissioner ignores the initial word "Only", which seems in itself to negative his peculiar application of *ejusdem generis* to this case.

If contrary to the statutory history from 1913 to date, and the Treasury Regulations from 1918 to date, as well as the clear intent of the language of the withholding section, the purpose of Congress as authoritatively interpreted by the Treasury Department was to tax "compensation, remuneration, and emoluments", regardless of fixed periodicity, it is impossible to understand why the Treasury Department wasted so much time and effort through the years in explaining just what kinds of remunerations were subject to withholding and what were not. See Bulletin B on Withholding, and the other citations at pages 22-23, *supra*.

Apart from the clarity of its opening sentence, the following extracts from Art. 143-2, of Reg. 101, which has appeared without change from 1918 to date, seem utterly inconsistent with the Commissioner's theory:

> "Income is *fixed* when it *is to be paid* in amounts definitely predetermined. Income is determinable whenever there is a basis of calculation by which the *amount to be paid* may be ascertained. The income need not be *paid annually* if it is *paid periodically;* that is to say, *from time to time,* whether or not at regular intervals."

This emphasis on *periodical payment* seems not to sustain the more metaphysical conception of the *characteristics* of income and its *susceptibility* to lump-sum payment. The Commissioner recognizes (p. 43) that these definitions are against his theory. But he tries to extract support from the immediately following sentence:

> "That the length of time during which the payments are to be made may be increased or diminished in accordance with someone's will or with

the happening of an event does not make the payments any the less determinable or periodical."

Whatever else this somewhat Delphic sentence may mean, it surely does not apply to a simultaneous final exchange of rights for a lump-sum payment as here; it must refer to a case where some option or condition subsequent may operate to diminish the period of time fixed in an initial agreement. It cannot mean that where *both parties* (not merely "someone") have arranged in advance to diminish the "length of time" of the payments to instantaneity or zero in a single unconditional transaction, this shall give rise to taxable income because they might possibly have "willed" to effect their deal on a periodical royalty basis.

Next he relies on the sentence providing for withholding on distributable income of a trust. But this is taxable to a citizen, even if he is on a cash basis, whether it is actually distributed to him or not, and is treated likewise in the case of non-resident aliens.

Nor does his citation at page 44 of Article 143-3 of Treasury Regulations 101 seem pertinent. That section merely provides that periodical royalties otherwise taxable are exempt under the Treaty when paid to French subjects.

On the other hand, the following sentence from Article 143-2 seems wholly at variance with the Commissioner's contention:

> "*A salesman working by the month for a commission on sales which is paid or credited monthly receives determinable periodical income.*"

Could the implication be clearer that a commission paid on account of a single transaction, and not computed with reference to time, is not subject to withholding, because it is not periodical income?

This last quoted sentence epitomizes and gives complete departmental authority to all the less formal rulings cited at pages 22-23, *supra*.

Since the word "royalty" is not listed in the statutory list of income categories subject to withholding, the only permissible ground for including it by regulation would evidently be that it fulfills the requirement of fixed periodicity. But even if the criterion of taxability were to depend on whether the income is of a type that is usually paid periodically, the Court will at once observe that "royalties", *if the word includes all types of payment contended for by the Commissioner, are not ordinarily paid periodically.* No magazine or newspaper rights, and scarcely any motion picture rights are bought on a fixed periodical basis of payment, and the only literary transactions usually of that nature are book contracts (if based on the number of copies sold) and dramatic contracts (if based on a performance fee or a percentage of the box office receipts).

Surprisingly enough, the Commissioner cites, at pages 51-54, in support of the controlling effect of Congressional Committee reports upon statutory language, a careless typographical or clerical error in the House Committee's report on the 1918 Act (1939-1 Cum. Bull. (Part 2) 86, 96), which misquoted the 1917 Act as requiring information at the source only of "any fixed or determinable annual or periodical sum in excess of $800," whereas the Act actually required such information *whether the income was periodical or not.*

Such an evident error seems to be a strong argument against giving too much weight to the running comments of the Congressional Committees in trying to summarize the multitudinous provisions of the Revenue Acts. It certainly had no effect on the in-

terpretation of the 1917 Act (passed the preceding year), as appears from 8 Mertens, Federal Income Taxation, sec. 48N2, where the author points out that while "in the case of payments of fixed or determinable annual or periodical income to non-resident aliens" withholding returns are treated as information returns, this is not true when the income is fixed or determinable, but not annual or periodical, for then "there is no withholding and returns of information on Forms 1099 and 1096 are necessary." He cites Reg. 103, Sec. 19.147-1; Reg. 101, 94, 86, Art. 147-1; Reg. 77, 74, Art. 811.

Reg. 111, Sec. 174-1; Reg. 103, Sec. 19.147-1; Regs. 101, 94, 86, Art. 147-1; Regs. 77, 74, Art. 811; Regs. 69, 65, 62 and 45, Art. 1071; all contain the sentence: "Although to make necessary a return of information the income must be fixed or determinable, it need not be annual or periodical," followed immediately by a reference to the withholding section, which in each Regulation begins: "Only fixed or determinable annual or periodical income is subject to withholding." The distinction was brought out further in Art. 362, Regs. 62 and 45, where the two elements of the definition of such income were separated, viz "Only (a) fixed or determinable, (b) annual or periodical income is subject to withholding." Moreover, since 1917, millions of information returns and withholding returns have been filed pursuant to the different requirements of the two sections.

From this casual error in a committee report erroneously describing the Revenue Act of the preceding year, the Commissioner apparently concludes that Congress meant to eliminate the words "annual or periodical" years ago—probably in 1917 or 1918—and that the Revenue Acts should have been interpreted accordingly ever since.

The Commissioner at pages 45-47 suggests, as a ground for reversal not hitherto urged, that Curtis' rights were limited to 28 years, and would not cover the possible renewal period. The only ground for excluding the possibility of renewal from the sale to Curtis would appear to be that this expectancy was something separate and apart from the original copyright. In view of Wodehouse's age, the expectancy was exceedingly remote, and until this Court's decision in *Fisher Co. v. Witmark & Sons*, 318 U. S. 643, in 1943, its assignability was doubtful. Quite obviously the parties contemplated only one publication by Curtis, which was a pre-requisite to the starting of the 28-year statutory copyright period, and what happened during the remainder of the 28-year period, or might happen during the possible period of renewal, had no bearing on the amount of the payment. This is in striking contrast with a payment of interest, which is computed wholly in relation to time at a fixed periodical rate.

The Commissioner concludes by assuming that Congress intended (p. 56) "to make non-resident aliens taxable on amounts susceptible of collection of the tax thereon by withholding at source, that is, on amounts which are wholly income when paid". There seems to be no factual basis for this assumption. On the contrary, it seems clear that Congress intended to tax only income *subject*, not *susceptible*, to withholding, and hence not to tax isolated payments of commissions, for example.

The new concept of "amounts which are wholly income when paid" has never been mentioned, we believe, in any Revenue Act or departmental ruling from 1913 to date. And it seems a fundamental weakness in the Commissioner's position that he has been

unable to find any authority in the statutes or in the Treasury's regulations or rulings, either before or after 1936, which even hints that such non-recurrent payments to authors as those here in question have ever been subject to withholding, though such payments have been commonplace at all times since 1913.

A final inconsistency in the Commissioner's position lies in his admission (pp. 57-59) that if Wodehouse had sold his entire copyright to Curtis, the proceeds would not be taxable. Under this theory, if an author licensed the serial rights to one publisher, the book rights to a second, and the motion picture and television rights to a third, for $100,000 each, in the same year, he would be taxed in excess of $200,000, while if he sold the whole copyright for $300,000, he would pay no tax whatever. There is no doubt that Congress has the power to levy such discriminatory taxes, if it wishes. But it would seem strange indeed for the courts to impose such a seemingly unjust result, in the face of the plainly expressed intention of Congress, buttressed by an unbroken line of departmental rulings, that only fixed or determinable annual or periodical income is taxable to non-resident aliens like the taxpayer.

CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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